

Vermont Supreme Court Affirms Local Control Over Highway Reclassification Process

In October 2008, the Dorset selectboard provided notice that it intended to consider reclassifying a section of Kirby Hollow Road. The selectboard made a site visit, held a public meeting, and took testimony from interested parties. Thomas and Lisa Ketchum, owners of the only residence on the road, attended the hearing and spoke against reclassification. The road foreman supported reclassification and testified that the road was dangerous to maintain and plow because it is narrow and steep. Since the road served only one seasonal residence and since the cost to improve the road was prohibitive, the selectboard concluded that continuing summer maintenance and winter plowing did not serve the public good of the Town. In December 2008, the selectboard issued a decision reclassifying the road.

The Ketchums appealed the selectboard's decision to Bennington County Superior Court, hoping to provide new evidence and arguments against the reclassification. Judge John Wesley ruled that he would not consider any of the Ketchum's new evidence and that he would render a decision solely on the record made before the Dorset selectboard without additional evidence. Ultimately, Judge Wesley found that the record of the Dorset selectboard's reclassification meeting was "more than adequate to uphold the [selectboard's] determination against any charge of the arbitrary exercise of authority," and he affirmed their reclassification decision.

The Ketchums then appealed Judge Wesley's decision to the Vermont Supreme Court, arguing, among other things, they were entitled to a *de novo* appeal under 19 V.S.A. §740. The Supreme Court disagreed with the Ketchums. While 19 V.S.A. §740 affords a *de novo* appeal of a town's decision concerning laying out, altering, or re-surveying a highway, there is nothing in the statute granting a *de novo* appeal to a party contesting reclassification of a town highway. Instead, an appeal of a reclassification decision must be brought under Rule 75 of the Vermont Rules of Civil Procedure, which typically does not afford the parties an opportunity to present new evidence or make new arguments. In a Rule 75 appeal, the Superior Court "simply determines whether there is enough evidence to support the town's decision and whether it followed the proper procedure." *Ketchum et al. v. Town of Dorset*, 2011 Vt 49.

The *Ketchum* decision is an important one for Vermont selectboards because it has both positive and negative aspects. On the positive side, the decision supports this important local decision-making process and may result in fewer appeals of local reclassification decisions and the potential savings of municipal attorneys' fees. However, the decision also raises the bar for selectboards, because if their record of the reclassification proceeding is incomplete, the Superior Court may vacate the decision, which can result in additional hearings, delay, and increased expense for the town and its residents.

In the future, selectboards will need to keep in mind that generating an adequate record to support a highway reclassification decision will be nearly as important as the decision itself. First and foremost, reclassification hearings should be recorded and selectboard members and participating parties should speak clearly for the recording device. The chair should manage the testimony by requiring speakers to introduce themselves and preventing participants from talking over each other. Documents and written evidence should be marked and clearly referred to when testimony is taken. The board's decision must be in writing and include findings of facts and a

conclusion as to why the public good, necessity, and convenience of the inhabitants of the municipality requires (or does not require) reclassification. 19 V.S.A. §710. Findings must be clear and be supported by the record, and the conclusions must be based on the findings.

A copy of the decision is available at <http://info.libraries.vermont.gov/supct/current/eo2010-165.html>

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